MOHD NOOR YUNUS & ORS

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL REVISION NO: 43-16-99]
22 JULY 1999

CRIMINAL PROCEDURE: *Sentence - Imprisonment in default of fine - Offenders unable to pay fine - Whether court could stay sentence of payment of fine pending appeal of case - Criminal Procedure Code, proviso ss. 283(i)(b)(4), 311*

The offenders herein were convicted and sentenced to a term of imprisonment and a fine in the magistrate's court under the Police Act 1967 for taking part in an unlawful assembly. They filed an appeal against their conviction and sentence and applied for a stay of execution of the sentence. The magistrate granted a stay of the sentence of imprisonment only. The offenders were unable to pay their fines. As they would have to serve imprisonment in default, they applied to this court to revise the order of a stay of the execution of the fine under s. 311 of the Criminal Procedure Code ('the Code').

Held:

[1] The accepted rule of practice is that in applications for a stay of execution under s. 311 of the Code, a stay will be granted in respect of the term of imprisonment but a sentence of a fine will have to be paid. This practice is essentially based on the reasoning that a fine could be refunded while the clock could not be turned back on a loss of liberty. This reasoning holds true only in the case where the convicted person is able to pay the fine.

[2] The proviso at the end of s. 283(i)(b)(4) clearly provides that where time for payment has not been given, an order for imprisonment in default shall not be issued at the 1st instance unless it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment. Thus, if a person is unable to pay a fine, he must be brought back before the court and the alternatives must first be considered by the court before he is sent to prison in the 1st instance for default of payment of the fine. If time is given for payment or the fine is to be realised by levy or distress, the court may require the offender to execute a bond.

[3] The failure to apply for time or to pay by instalments had resulted in the proviso to s. 283(i)(b)(4) not having been complied with and the offenders had been in prison custody for one day. Taking that into account and since the stay in respect of their sentence of imprisonment had been stayed by the trial court, the sentence of the payment of the fine pending appeal would be stayed instead of being sent back to the magistrate so as to avoid further detention of the offenders.

[Order accordingly.]

Case(s) referred to:
Sin Yong Chang v. PP [1948-49] MLJ Supp 125 ***(refd)***
PP v. Tan Yook Kee, PP v. Kupusamy [1939] 8 MLJ (FMSR) 159 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 311, 283(i)(b)(4)
Police Act 1967, ss. 27(4), (5), (8)

Criminal Procedure Code [India], s. 389

Other source(s) referred to:
Criminal Procedure in Malaysia, Mimi Kamariah Majid, 2nd edn
Mallal's Criminal Procedure, 5th edn, p. 4907

For the appellants - Sulaiman Abdullah (Ambiga Sreenevasan, Charles Hector, Stanley Sinappan & R Sivarasa with him)
For the respondent - Abang Iskandar Abang Hashim, DPP

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

The offenders together with others have been convicted after a trial in the magistrate's court on two charges under s. 27(4)/27(8) Police Act 1967 (Act 344) and s. 27(5)/27(8) Police Act 1967 and have been sentenced to a term of imprisonment and a fine. These persons, including the offenders have filed an appeal against their conviction and sentence, and applied for a stay of execution of the sentence. The learned magistrate granted a stay of the sentence of imprisonment only.

The two charges against them are as follows:

Pertuduhan Pindaan:

Bahawa kamu pada 17 Oktober 1998 di antara jam 9.30 malam hingga 10.30 malam, di kawasan persimpangan Jalan Raja dengan Jalan Lebuh Pasar, dalam

> Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan Kuala Lumpur sebagai anggota satu perhimpunan haram (unlawful assembly) telah mengingkari perintah untuk bersurai yang di berikan oleh Penolong Kanan Pesuruhjaya Polis II Zainal Abidin Bin Ali, Ketua Polis Daerah Dang Wangi, Kuala Lumpur, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 27(4) Akta Polis 1967 (Akta 344) yang boleh di hukum di bawah seksyen 27(8) Akta yang sama.
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> Pertuduhan Pilihan Pindaan:
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> Bahawa kamu pada 17 Oktober 1998 di antara jam 9.30 malam hingga 10.30 malam, dikawasan persimpangan Jalan Raja dengan Jalan Lebuh Pasar, dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan Kuala Lumpur telah dijumpai di satu perhimpunan haram (unlawful assembly), oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 27(5) Akta Polis 1967 (Akta 344) yang boleh di hukum dibawah seksyen 27(8) Akta yang sama.

Mohd. Noor Yunus (the 1st offender) and Baharom Md. Nor (3rd offender) were fined RM3000 in default three months imprisonment whereas Mazlan Mat Hassan (2nd offender) was fined RM2500 in default two months imprisonment. Their imprisonment sentences, which were stayed, were for a term of three months.

The offenders were unable to pay their fine and would have to serve the term of imprisonment in default. Thus they have made this application to the judge of the High Court to revise the order of a stay of execution of the fine under s. 311 Criminal Procedure Code (CPC).

Section 311 CPC states as follows:

> Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment order, conviction or sentence pending appeal, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment order, conviction or sentence as to the Court below or to such Judge may seem reasonable.

The accepted rule of practice generally is that in relation to applications for a stay of execution under s. 311 (the Code) is that while a stay would be granted in respect of the term of imprisonment, a sentence of a fine would have to be paid. *Sin Yong Chang v. PP* [1948-49] MLJ Supp 125 does not support the proposition that there can be no stay for a fine. That case decided the point where the sentence is a fine, and the fine has been paid, the question of bail pending appeal does not arise. The case was cited only on this point and no further in *Criminal Procedure in Malaysia* by Mimi Kamariah Majid (2nd edn). This practice is essentially based on the reasoning that a fine could

be refunded, while the clock could not be turned back where there has been a loss of liberty (refer *Mallal's Criminal Procedure* 5th edn, at p. 4907).

However, the above reasoning holds true only in the case where the convicted person is able to pay the fine. In fact the others charged together with the offenders were able to raise the money to pay their fines, and have been able to secure their liberty pending disposal of their appeal. Except for the three offenders.

Before I proceed any further it is necessary to consider the specific legislation relating to payment of a fine. This is contained in s. 283(i)(b) of the Code:

> 283 Provision as to sentences of fine
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> (i) Where any fine is imposed under the authority of any law for the time being in force, then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply (that is to say):
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> (a) where no sum is expressed to which the fine may extend the amount to which the offender is liable is unlimited, but shall not be excessive;
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> (b) in every case of an offence in which the offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, do all or any of the following things:
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> (1) allow time for the payment of the fine;
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> (2) direct payment of the fine to be made by instalments;
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> (3) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender;
>
> (4) direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence:
>
> **Provided that where time is not allowed** for the payment of such fine **an order for imprisonment in default of payment shall not be issued in the first instance** unless it appears to the Court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment;

The proviso at the end of s. 283(i)(b)(4) provides clearly that where time for payment has not been given, as occurs in this case, an order for imprisonment in default shall not be issued at the first instance unless it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment. Thus in practice a person may not be sent to prison in default of paying a fine unless he is first brought back to the court which will hear as to whether he has or has not sufficient property to satisfy the fine, or that the levy of distress is going to be more injurious to him or his family than imprisoning him.

Reference to the practice under the Indian Criminal Procedure Code is of little assistance since the corresponding s. 389 is differently worded. The structure of the section envisages that ordinarily after a sentence of fine has been passed, the person sentenced may apply for time to pay the fine or to pay by instalments. If time is not allowed by the court, then the court must proceed to consider issuing a warrant for the levy of the amount by distress and sale of any property belonging to the offender. The proviso to s. 283(i)(b)(4) makes it clear that where not time has been allowed for payment of the fine, imprisonment in default of the fine is only to be carried out if it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment. In other words, if a person is unable to pay a fine, he must be brought back before the court and the alternatives must first be considered by the court before he may be sent to prison in the first instance for default of payment of the fine. If time is given to pay the fine, or the fine is to be realised by levy or distress, the court may require the offender to execute a bond.

The following case may serve as an illustration. In *PP v. Tan Yook Kee, PP v. Kupusamy* [1939] 8 MLJ (FMSR) 159 two prisoners were confined to prison for defaulting a sentence of fine. The learned magistrate directed the prisoners to be produced before him and released them from custody on the execution of a "bond to pay the fines by instalment," in one case and "pending realisation of the fine" in the other. Upon revision by the judge it was held that there was nothing illegal in what the magistrate had done. The reasons given are of more direct interest. At p. 159, Cussen J stated that:

> The provisions of section 283(i)(b) are not part of the sentence but alternative methods of enforcing the sentence as is evident from the words used *ie*, "the Court passing the sentence may ... ."

> I agree with the Deputy Legal Adviser that the Magistrate, who imposes the sentence of fine, is not functus officio" there and then, and can exercise any of the powers given by section 283(9)(f) at any appropriate time until the fine is paid or levied.
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> I think that it is in the interests largely of the persons sentenced that this should be so; as the provisions of that section (283(i)(b)) are obviously framed to enable the Court to give any consideration to what is in the best interests of the person sentenced e.g. the first proviso to section 283(i)(b).

In this case the section was not complied with because no one has applied to the magistrate for time to pay the fine, or to pay it by instalments, or told the magistrate the three offenders were unable to pay the fine. Any of these three applications would have brought the offenders back before the magistrate before the offenders are imprisoned for default. Being a matter uniquely within the knowledge of the offender, these are matters that ought to be brought to the court's attention by the offender, or his counsel. Without an application being made or being informed the offender is not in a position to pay the fine, the court cannot give time for payment, and when a fine is not paid when no time for payment has been applied for, then the court cannot but conclude that the offender could pay but chooses not to pay. Where the person chooses not to pay he cannot but must be imprisoned for default.

Returning to the subject of a stay of execution, s. 311 specifically states that an appeal shall not operate as a stay of execution. It is left to the discretion of the court. At first instance it is at the discretion of the trial court. Superficially it would appear that a court having convicted an offender, would be unlikely to grant a stay of execution of the sentence. In actual fact, in the great preponderance of cases, the courts have granted a stay, mainly of sentences of imprisonment. In most cases no reasons have been recorded for the grant of the stay. One is left with the distinct conclusion that the court is concerned to avoid the impression it is affected by the fact it has convicted the offender, and at the same time is expressing its humble deference to the appellate court. Such a lenient, indulgent or easygoing approach lays open the discretion under s. 311 to exploitation and abuse of the process convicted offenders who choose to delay their just punishment. In many cases the opportunity was taken to abscond. The judicious exercise of the discretion under s. 311 requires that the court must consider whether in its view the appeal is frivolous and vexatious, the conviction and sentence is plain and obvious, and the application is therefore an abuse of the process. If so, it must refuse the application for a stay.

The failure apply for time or to pay by instalments in this case has resulted in the proviso to s. 283(i)(b)(4) not having been complied with, and the offenders have been in prison custody for one day, perhaps needlessly. Taking

that into account and since the stay in respect of their sentence of imprisonment has been stayed by the trial court, I would in this exceptional circumstance stay the sentence of the payment of the fine pending appeal instead of sending this case back to the magistrate to avoid further detention of the offenders.